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ADMINISTRATIVE LAW SECTION

AMERICAN BAR ASSOCIATION

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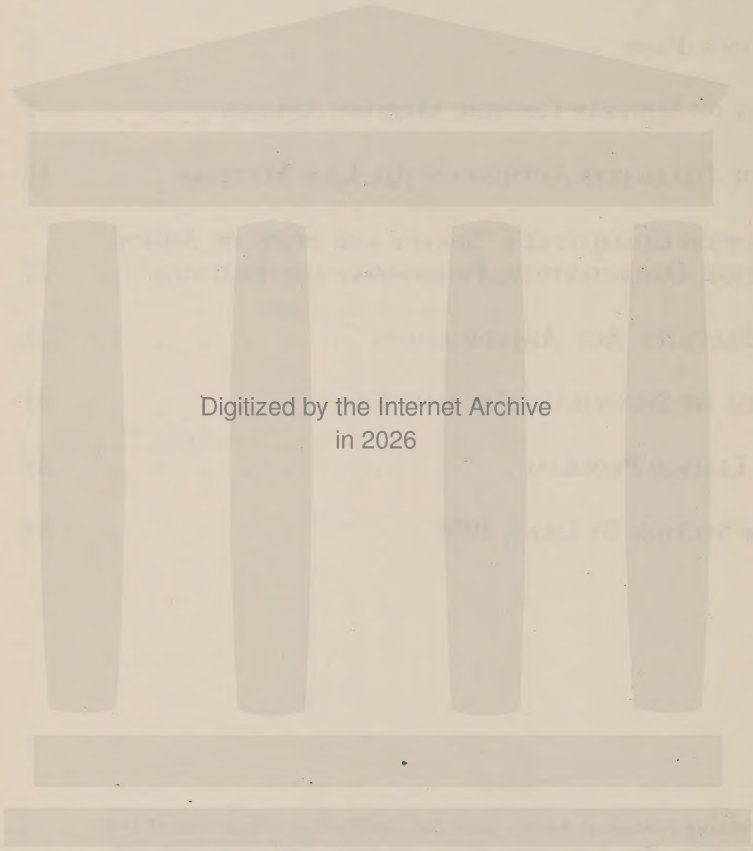
Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.



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CHAIRMAN'S PAGE

Plans for the Annual Meeting in Los Angeles are under way and we are able to announce the following schedule of Section activities.

Annual Meeting:

The 1958 Annual Meeting of the Section will be held in Los Angeles from Saturday, August 23rd through Tuesday, August 26th, 1958, at the AMBASSADOR HOTEL. The tentative schedule is as follows:

Saturday, August 23rd

12:30– 2:00 P.M. Luncheon Meeting of Council
2:00– 5:00 P.M. Meeting of Council and Committee Chairman

Sunday, August 24th

10:00–12:00 P.M. Meeting of Council and Committee Chairman
2:00– 4:00 P.M. Meeting of Council and Committee Chairman

Monday, August 25th

2:00– 6:00 P.M. Section Meeting (Program to be Announced)

Tuesday, August 26th

10:00–12:00 P.M. Section Meeting–Committee Reports
2:00– 4:30 P.M. Section Meeting–Committee Reports
4:30– 5:00 P.M. Election of Officers and Council Members
5:30– 7:00 P.M. Council Organization Meeting

Nominating Committee:

Giving effect to the newly adopted By-laws of the Section, the following have been designated as the Nominating Committee for the Annual Meeting:

ASHLEY SELLERS, *Chairman*
FREDERIC L. KIRGIS
BRYCE REA, JR.

Annual Spring Meeting

The briefing session on Administrative Law, originally contemplated to be held this Spring, is tentatively rescheduled for November 14-15, 1958. This deferment was deemed advisable in order to obtain suitable hotel facilities and to allow time need for adequate preparation of such a meeting.

DONALD C. BEELAR, *Chairman*

SUMMARY OF MIDYEAR COUNCIL MEETING ACTIVITIES

The Council of the Section of Administrative Law held its mid-year meeting on February 22-23, 1958, in Atlanta, Georgia.

Minutes—approval of

Minutes of the meeting of the Council in New York City, July 11, 1957, of the mail vote of August 1957, of the mail vote of September 1957, and of the mail vote of January 1958, were approved as previously distributed.

Report of National Committee

(a) *Committee Reports—Legislation*

Arnold Levy, chairman of the National Committee, made a general report on legislative matters. No action required.

(b) *Status Report on Implementation of Approved Actions*

After some discussion of pending matters generally, Mr. Levy agreed to prepare for the Council a verbatim collation of all outstanding authorizations:

(1) From the Section to the Council; and
(2) From the House of Delegates to the Section.

Report of Section Committees

(a) *Committee Organization and Annual Meeting Program*

The work of the committees of the Section, their membership, scope of activities, and related matters were discussed. No specific action taken.

(b) *Action Recommendations of Respective Committees*

(1) *Aviation Matters*

Harold L. Russell, Council liaison for the Aviation Committee, reported that coordination of the resolutions of the Section's com-

mittee with the Standing Committee on Aeronautical Law of the Association had been made without effecting agreement between the two committees—that the Standing Committee on Aeronautical Law had expressed unanimous opposition to all of the resolutions under consideration. This despite the fact that, with respect to the first resolution, a bill embodying this position has already passed the Senate and no opposition was voiced by the Standing Committee or by any other ABA group.

It was the sense of the Council that the three resolutions on Aviation Matters should be presented to the Council for mail vote, together with such data as may be submitted by the Standing Committee on Aeronautical Law and the Section's Aviation and Judicial Review Committees. It was further agreed that this should be done by May 1, 1958.

(2) *Immigration and Nationality Matters*

The report and recommendations of the Immigration and Nationality Committee had been previously approved by a mail ballot. When the matter came up for consideration—on the special agenda —Whitney R. Harris, the Council liaison for the Section Committee, suggested a conference with the Section of International and Comparative Law to attempt to obtain concurrence. After some further discussion, Mr. Harris moved to reaffirm the mail vote action, with the deletion from the resolution of the words "and take such other steps, etc." and the substitution therefor of the words "authority to advance appropriate legislation to that end." This motion was seconded by Earl Kintner.

Mr. Benjamin thereupon moved to amend the resolution to specify Department of Justice or independent agency and Mr. Harris and his second, Mr. Kintner, accepted the suggested amendment to the motion. The Harris motion, as amended by the Benjamin suggestion, was unanimously adopted.

The Resolution as adopted is as follows:

Resolved, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

That it is the opinion of the American Bar Association that the immigration and nationality laws of the United States be amended to consolidate into the Department of Justice or an independent agency of government the immigration and nationality responsibilities now

vested by law separately in the Department of State and in the Attorney General, and

That the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.

(3) *Administrative Procedure Act*

Robert M. Benjamin, as Council liaison, reported for the Administrative Procedure Act Committee relative to that committee's position with respect to S. 2148, H.R. 7173, S. 2461, and S. 2462.

(4) *Judicial Review*

The Committee on Judicial Review made several recommendations for action by the Council:

(a) *Bill relating to Court of Customs and Patent Appeals*

The Committee recommended that the Council recommend to the House of Delegates the adoption of a resolution in support of the enactment of H.R. 7866, 85th Congress, 1st Session.

During the discussion it was ascertained that the matter had not been cleared with all other interested committees. It was moved, seconded and duly adopted that no action now be taken but that the matter be cleared with other committees and a report on the subject made at the Annual Meeting in Los Angeles.

(b) *Bills to Limit Appellate Jurisdiction of Supreme Court*

The Committee recommended that the Council of the American Bar Association oppose the enactment of S. 2646 and H.R. 9207, 85th Congress, 1st Session. Mr. Poole moved to table the recommendation. The motion was seconded by Mr. Denning and adopted with two dissents.

(c) *Bill granting right of hearing and Judicial Review to certain Civil Service employees*

The Committee on Judicial Review recommended that the Section of Administrative Law recommend to the House of Delegates the adoption of a resolution supporting the enactment of H.R.

6829, 85th Congress, 1st Session. Mr. Benjamin pointed out that H.R. 3350 provides for no hearings for Government lawyers. Fanney N. Litvin, chairman of the Standing Committee on Civil Service of the ABA, stated her committee's concurrence with the Berger report and recommendation. She further stated that the bill was not assigned to her committee but that the report of the Judicial Review Committee of the Section was sent to her and she, in turn, submitted it to all members of her committee.

Mr. Denning moved that the report and recommendation be adopted. The motion was duly seconded but failed of adoption since it did not receive the affirmative vote of the majority of the Council, as required by the by-laws.

(d) *Bill re Judicial Review of certain findings of Secretary of Labor*

The Committe on Judicial Review recommended that the Council recommend to the House of Delegates adoption of a resolution in support of the enactment of H.R. 8214, 85th Congress, 1st Session. Mr. Harris moved a substitute motion which was seconded by Mr. Nelson.

Mr. Harris then withdrew his substitute resolution and moved to refer the matter to the Ad Hoc Committee on Code of Administrative Procedure. This motion was seconded by Mr. Poole and adopted.

(5) *Public Information*

L. Clair Nelson, Council liaison with the Committee on Public Information, and John Mitchell, chairman of such committee, reported generally on its activities. No action was requested.

(6) *Representation before Government Agencies*

A progress report by Theodore Haas, chairman of this committee, was made. No action was recommended.

(7) *Budget and Finance*

Herman Tocker, chairman of the Committee on Budget and Finance, reported orally, giving the highlights of his written report.

Management and Organization Matters

Chairman Beelar reported the roster of appointments of Council members to serve as liaison with other ABA Sections and Committees with view toward correlation of activities on matters of common interest and jurisdiction.

Agency Member-Section Liaison Program

Ashley Sellers, chairman of the Agency Liaison Program, reported that substantial success had been made in implementing this program, that about twenty agencies have named staff liaison, and that a luncheon meeting of the group was held recently. He further reported that Willard Gatchell, general counsel of the Federal Power Commission, had been named by the agency members as co-chairman to work with Mr. Sellers. This liaison arrangement is a focal point for two-way communication for the consideration of many problems—other than legislative matters which will not be considered by the group.

Proposed Spring Meeting in Washington

By action of the Board of Governors the Administrative Law Section has been given authority to hold an Annual Spring Meeting in Washington, D. C. beginning in 1958. (It is planned to hold the first meeting in Wash. D. C. Nov. 14-15, 1958.)

Agency Fees and Charges

Chairman Beelar made reference to the Bureau of the Budget directive of November 19, 1957, as a matter of information. Mr. Russell stated the belief that we need continuous surveillance of this matter. Mr. Cragun stated that statutory authority to charge fees now exists with respect to many agencies.

Improper Influence Matter

A proposed resolution, which had been previously circulated, was one of the items specially calendared for consideration on Saturday morning, February 22. After an individual poll of the officers and other Council members, and general discussion of the matters encompassed by the proposed resolution, the Chairman asked for a determination of whether we should take any action

on the subject matter of the resolution at this time. William I. Denning thereupon moved that the question of whether we shall take any action at this time be put to a vote. The motion was duly seconded and, by show of hands, the majority of the Council members voted to take some action. Thereafter, the Chairman appointed a committee composed of John B. Gage, Harold L. Russell and Hans A. Klagsbrunn, with Frank C. Newman as an alternate member, and Robert M. Benjamin as counsel to the committee, to draft proposed resolution.

The drafting committee reported Sunday morning, February 23, that it had considered the proposal previously circulated to the Council, together with a draft proposed by Mr. Kintner, a draft proposed by Mr. Harris, and a partial redraft by Mr. Benjamin; and that the group had reached an outline of conclusions and separated the matter under consideration into two parts which were covered by separate resolutions.

Pursuant to the agreement to consider the two resolutions separately, Mr. Gage then moved the adoption of the first resolution, as amended. The motion was seconded and adopted, with one dissenting vote. Mr. Gage thereupon moved adoption of the second resolution, as amended, which was seconded by several and unanimously adopted.

NOTE: The aforementioned resolutions were adopted by the House of Delegates on February 25, 1958, with two changes, namely, (1) the insertion of the word "adjudicative" before the word "proceedings" in the second paragraph, and (2) the substitution of the words "standards of conduct" in lieu of the word "ethics" in the fifth line of the final paragraph.

New Business

(a) *Junior Bar Conference Committee*

Mr. Nelson moved that the chairman be given authority to appoint a special committee to work as liaison with the Junior Bar members. The motion was seconded by Mr. Harris and adopted.

(b) *National Committee*

The subject of the matter of reporting of committees was discussed. Mr. Cragun moved the adoption of the resolution which had been previously submitted to the Council members. The motion was seconded by Mr. Russell and adopted.

Resolved, That the internal procedure for the processing of reports of Section Committees provide for the submission of reports direct to the Council by the filing of Committee Reports with: (1) the Section Chairman, (2) the Committee Liaison Council Member, and (3) the Chairman of the National Committee. The Chairman of the National Committee will continue to coordinate committee reports, particularly on legislative matters, and advise the Council on scope and correlation matters pertaining to committee reports. The National Committee, in addition to its legislative responsibilities, will organize and administer a federal agency liaison program to foster Section and agency relationships and facilitate particular committee operations. (NOTE: No by-laws revision is involved.)

(c) *Committee on Health, Education and Welfare Matters*

John B. Gage moved that a committee be set up to cover Health, Education and Welfare Department matters, except its Food and Drug activities. The motion was seconded by Mr. Cragun and adopted.

(d) *Proposed Congressional Committee Matter*

Mr. Klagsbrunn made a progress report on the setting up of a Congressional Committee on Administrative Practice and Procedure. He moved that this Section recommend that ABA action on this matter be handled by an ad hoc committee under the special Committee on Legal Services and Procedure. The motion was seconded and adopted.

Resolved, That the Section of Administrative Law recommend to the House of Delegates the adoption of the following resolution:

> *Resolved,* (1) That an additional ad hoc committee be authorized which shall represent the Association in carrying out the resolution adopted by the House of Delegates on February 20, 1956, favoring the establishment, within the Congress of the United States, of a permanent committee on administrative procedure; (2) that it be known as the "Committee on Permanent Congressional Committee on Administrative Procedure"; and (3) that its chairman be a member of the Committee on Legal Services and Procedure.

Mr. Poole then moved that, in order to provide interim action by the Section, the chairman be empowered to arrange for work-

ing arrangements pending action by the House of Delegates or the Board of Governors. After some discussion of overlapping jurisdictional problems between the Section and the ad hoc committees, particularly the Cragun ad hoc committee, the Poole motion was seconded and adopted. Mr. Poole agreed to enumerate the problems involved and to make suggestions relative thereto in writing.

Reports of ABA Standing Committee Chairmen

The chairmen of several Standing Committees of the American Bar Association, whose jurisdiction relates to subject matters which are also within the jurisdiction of the Section on Administrative Law, spoke briefly at a special 9:30 a.m. session of the Council on February 23 on matters and problems of common interest to their respective committee and the Section. The speakers included Fanney N. Litvin, chairman of the ABA Committee on Civil Service; Fred W. Albertson, chairman of the ABA Committee on Communications Law; Clarence A. Davis, chairman of the ABA Committee on Administrative Agency Appointments; Franklin Stone, a member of the ABA Committee on Aeronautical Law (in lieu of William S. Burton, chairman of that committee); John W. Cragun, chairman of the ABA Ad Hoc Committee on the proposed Code of Administrative Procedure; and Donald C. Beelar, chairman of the ABA Ad Hoc Committee on Office of Federal Administrative Practice Act (S. 932 and H.R. 3350).

Nominating Committee

The chairman called attention to the new by-laws provision that the chairman shall appoint a Nominating Committee, after consultation with Council members, and asked each Council member to provide him in writing with a suggested member of the Nominating Committee.

The meeting adjourned at 12:30 p.m., February 23, 1958.

HOUSE OF DELEGATES ACTIONS ON AD. LAW SECTION MATTERS

By Law Revisions:

Amendments to the Section's by-laws were approved dealing with method of nomination of officers, qualifications and tenure for officers and council members, and other matters dealing with the organization and operation of the Section.

Resolutions re Immigration and Nationality:

1. WHEREAS, Recent decisions of the Supreme Court of the United States have construed Section 10 of the Administrative Procedure Act as applicable to deportation and exclusion orders under the Immigration and Nationality Laws of the United States; and

WHEREAS, Legislation has been introduced in the Congress to restrict judicial review of deportation and exclusion orders under said laws,

Be It Resolved, That the American Bar Association favors judicial review, under Section 10 of the Administrative Procedure Act, of deportation and exclusion orders under the Immigration and Nationality Laws of the United States and that the Section of Administrative Law be authorized and directed to oppose legislation designed to restrict judicial review of such orders.

2. WHEREAS, The Board of Immigration Appeals of the Department of Justice is established by regulation only, with no statutory assurance of either its existence or jurisdiction.

Be It Resolved, That it is the opinion of the American Bar Association that the Board of Immigration Appeals of the Department of Justice be granted statutory status and authority and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.

Resolution re Judicial Review:

Be It Resolved, That the American Bar Association supports the enactment of H.R. 272, 85th Cong., 1st Sess., a bill to permit judicial review of decisions of the Administrator of Veterans' Affairs, with a recommended amendment which would substitute review

in the appropriate United States District Court for review in the appropriate Circuit Court of Appeals and that it authorizes the Section of Administrative Law to appear before the Committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.

Resolutions re Agency Tribunal Standard of Conduct:

1. *Resolved,* That the American Bar Association notes with satisfaction comprehensive studies of the organization, procedures and practices of agencies of government in the conduct of rule making, adjudication, and related functions, undertaken in the Congress of the United States, together with publication of the responses of the agencies as a basis for further inquiry;

Resolved, That the American Bar Association believes that Congressional Committees and agencies of government should continue and complete the comprehensive study of agency organizational and procedural requirements needed to reaffirm and safeguard the rights of citizens and assure public confidence in *adjudicative* proceedings free from improper influences;

Resolved, That Congressional action should simultaneously be taken on proposals with respect to administrative agency practice, procedure and judicial review adopted by the American Bar Association on February 20, 1956. To do so would do much to promote public confidence in the integrity of the exercise of administrative agency legislative and judicial functions.

2. WHEREAS, The American Bar Association has repeatedly urged that the organization and procedure of federal administrative agencies in the exercise of adjudicatory powers provide (1) that hearing officers be assured independence of judgment and impartiality in the trial of agency cases, (2) that the integrity of the judicial process at all levels in the agency be protected by confining decisions to the public hearing-record in an environment totally free from any ex-parte- off-the-record representations, influences or pressures from any source.

Now, Therefore, Be It Resolved, This Association records its opinion that more effective agency and Congressional action to those ends would improve and inspire greater public confidence in agency adjudicatory determinations, and believes it desirable that an appropriate code of agency-tribunal *standard of conduct* comparable to the Canons of Judicial Ethics be established by statute binding upon all persons engaged, interested, participating in, or seeking to affect the result of the adjudication of agency-tribunal cases.

THE DAWSON COMMITTEE'S "SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATION, PROCEDURE, AND PRACTICE"

(Address by VICTOR G. ROSENBLUM, Associate Counsel of the Executive and Legislative Reorganization Subcommittee, before the Administrative Law Section of the American Bar Association in Atlanta, Georgia, February 22, 1958.)

Needless to say, any opinions I express are my own. I do not and cannot present findings, beliefs or conclusions on behalf of the Committee on Government Operations. I am indebted to Chairman Dawson for his encouragement and advice at every stage of this study and I am obliged to you for the invitation to discuss the progress of the study with you.

At the present stage of the Dawson Committee's study of administrative organization, procedure and practice, four general points are worth noting: (1) consistent and continuing supervision by Congress of the work of administrative agencies is an absolute necessity; (2) most agencies regard Congressional questionnaires as an imposition—like taxes to be faced ultimately but then only with distaste and with only minimum disclosures; (3) the broad discretionary authority wielded by officials of most agencies today poses anew one of democracy's most crucial problems: how can we confer on administrators sufficient discretion to carry out the multiple, complex functions assigned to them by Congress, but not so much discretion as leads to arbitrary action, or worse, encourages the influence peddler to seek entree; (4) it would be helpful to draft supplementary Congressional directions to the agencies on the subject of construing Congressional intent. Despite allegations of most agencies that they have no difficulty determining Congressional intent, at least several cases warrant a contrary conclusion.

I would like to comment on each of these points with some illustrations.

(1) The point about need for consistent and continuing supervision by Congress is certainly self-evident to the members of this Section. Your role in sponsoring H.R. Res. 462 of the 84th Congress attests to that fact. I do not believe, however, that all of you are familiar with the role of the Dawson Committee in supervising

the administrative process and some description of that role may be helpful to you.

Pursuant to House Rule XI, which deals with the powers and duties of committees, only two committees are authorized to engage in "studies" of government agencies, the Committee on Appropriations and the Committee on Government Operations. Paragraph 2 of Rule XI authorizes the Appropriations Committee "to conduct studies and examinations of the organization and operation of any executive department or other executive agency as it may deem necessary to assist it in the determination of matters within its jurisdiction."

The authority of the Government Operations Committee is described in even broader language in Paragraph 8 of Rule XI. The Government Operations Committee is not merely "authorized" to conduct studies of agency procedures and practices; Paragraph 8 charges it with the explicit *duty* of "studying the operation of government activities at all levels with a view to determining its economy and efficiency" and of "evaluating the effects of laws enacted to reorganize the legislative and executive branches of the Government."

The words "with a view to determining its economy and efficiency" operate both to explain and set the boundaries to the Committee's jurisdiction. If the statement of the Committee's powers ended with "studying the operation of Government activities at all levels," the Committee would then have blanket jurisdiction to investigate anything and everything in government, including all questions of substantive policy. However, the addition of the phrase "with a view to determining its economy and efficiency" makes clear the intent of Congress that the Government Operations Committee shall focus these studies on government operations that affect the economy and efficiency of government departments and agencies; and the factors that affect economy and efficiency are basically factors of procedure and organization.

Dr. George Galloway, who served both as staff director of the Joint Committee on the Organization of Congress and as chairman of a special committee on Congressional Reorganization of the American Political Science Association, has stated that it was the intent of the Legislative Reorganization Act to establish for Congress a "three-way division of labor in the performance of the oversight function." In his book on *The Legislative Process in Con-*

gress (1953), Dr. Galloway points out that the subject matter committees were expected to review questions of substantive policy involving government agencies; the Appropriations Committees were expected to study questions affecting the exercise of the appropriations function; and the Government Operations Committees (which until 1952 were known as Committees on Expenditures in the Executive Departments) would, among other duties, "undertake to review administrative structure and procedures."

When in 1948 the co-sponsor of the Legislative Reorganization Act, Sen. Robert M. La Follette, Jr., was asked to comment on the jurisdiction of the Government Operations Committees, he too indicated that the Legislative Reorganization Act accorded a comprehensive role to the Government Operations Committee. Sen. Ferguson had commented that "In the bill itself you did provide that the Executive Expenditures Committee be authorized to investigate at all levels." Sen. La Follette responded: "That is correct because we felt that there was need for a committee which would have as its primary objective increased efficiency in both the executive and legislative arms of the Government. . . ." (Hearings before the Committee on Expenditures in the Executive Depts., U.S. Senate, 80th Cong., 2d Sess., "Evaluation of the LRA of 1946," Feb. 18, 1948, p. 77).

The Committee charged with responsibility for studying and evaluating questions of economy and efficiency in governmental administration must examine, with consistency and continuity, all phases of administrative procedure and practice. For reforms in procedure and organization are major means for securing greater economy and efficiency.

At the request of the Bolling Subcommittee of the Rules Committee which held hearings on H.R. Res. 462, the Legislative Reference Service of the Library of Congress prepared a memorandum on the oversight of administrative procedure by Congress. Included in the LRS memo was the following clearcut statement:

> Specifically, the Committee on Government Operations already is authorized to supply what the Resolution proposed for the new committee in the way of oversight; viz., (1) unified consideration of proposals regarding administrative procedure applicable throughout the administrative agencies; (2) a qualified permanent staff constantly studying problems of administrative procedure, where knowledge and training are available to the subject-matter com-

mittees dealing with specific agencies; and (3) a single investigative staff. Government Operations also receives all Executive reorganization measures, with the duty of evaluating the effect of such laws, and this includes a study of all administrative activity thereunder. And it has the duty of "studying the operation of government, at all levels with a view to determining its efficiency and economy" (House Rule XI 8(c)(2)(3)).

By combining the expertise of the Government Operations Committee on procedural and operational matters with the expertise of the subject matter committees on specific questions of substantive policy, Congress can achieve its affirmative and constructive role in the direction and oversight of administrative agencies.

With these Committee responsibilities in mind, Chairman Dawson undertook a comprehensive survey of current problems in administrative organization, procedure and practice. With the assistance of attorneys in government and in private practice a comprehensive questionnaire focussing on details of rulemaking, adjudication, separation of functions, and problems of internal management, was sent to 41 executive departments and independent agencies. The questionnaire approach was deemed valuable for three reasons: (1) there was need for a public record of the agencies' own views of their statutory powers and duties; (2) too frequently the agencies were unaware of one another's procedures and were hesitant for various reasons to exchange information with one another. Compiling a public record of all agency procedures and practices would facilitate comparative studies and encourage uniformity where feasible; (3) compiling a public record would enable members of the bar and of the public to remove the veil of mystery that too often surrounds administrative practice.

It was recognized, of course, that comprehensive, all-inclusive answers might not greet this initial questionnaire, but the Committee felt that a valuable beginning could be made and was more than worth the effort.

(2) The initial reaction of the agencies to the questionnaire was less than enthusiastic. Chairman Dawson had dispatched the questionnaire on November 19, 1956, and asked that responses to the rulemaking section be returned by December 20, 1956; that responses to the adjudication section be returned by January 15, 1957; and that the remaining sections be returned by February 15, 1957. Less than half a dozen agencies managed to adhere to that

schedule. Indeed, it was not until October 15 that the last response was returned. In part, of course, the delays in returning answers to the questionnaire could be attributed to heavy work loads in the agencies and to the desirability of testing the seriousness of the Dawson Committee's interest in the field. There is more than a scintilla of evidence, however, that several of the agencies were unaware of the details of their current procedures and practices and had neglected until nudged by the Committee to examine them in detail.

(3) Writing in the *Federalist Papers,* James Madison stated with clarity and candor the key problem of democratic government: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed and in the next place oblige it to control itself." [1] The Committee's study indicates that the problem remains very much with us. Let me cite a few illustrations that have developed in the course of this study. The illustrations are not designed to single out any agency for criticism for the illustrations are typical of identical problems in numerous other agencies. (My credibility will have to be accepted since I took no tape recorders with me in the course of my conversations with administrative officials.)

The staff had information that a Division of the Department of Justice had failed to honor its own commitment to an attorney representing a petitioner before the Division. An informal conference with a representative of the Division produced the admission that the attorney's charge was correct. "But you must remember," the representative went on, "that on the whole our agency endeavors to do a commendable job. Sometimes lawyers just don't understand what we are trying to do." He went on to describe, as an example of the lawyers' lack of understanding, how the Division had gone to great pains to describe in detail its functions and problems to an attorney with a case before it. The representative of the Division was insulted that after all of his effort, the attorney could only say, "I don't give a damn about your problems; I am concerned about the rights of my client."

I submit that there is a serious problem for democratic government when administrative officials can overlook violations of due

[1] The Federalists, A Commentary on the Constitution of the United States, New York, Random House (1937), at 337.

process in a single case and take refuge in the claim that "on the whole" they do a competent and fair job.

Let me examine another facet of the problem. The agencies claim—perhaps rightfully—long and expert experience in administering their functions. Examination of responses to the questionnaire shows frequent statements like this: "Members have a combined total of over 200 years experience with the Commission." Unfortunately, the inference many of the agencies expect the reader to draw from the long experience of their members is that he must have faith in the discretion of the administrator and must not question it at all.

Consider as but one example the response submitted by the Office of Vocational Rehabilitation in the Department of Health, Education and Welfare. The Office of Vocational Rehabilitation must make rules and regulations governing the administration of the Vocational Rehabilitation Act and must, among other duties, issue regulations designed to protect the preference of blind persons licensed by state agencies to operate vending stands on property maintained by the Department of Health, Education and Welfare.

The OVR maintains that the character of its relationship with the groups affected by its regulations "is not and should not be one of adversary but rather one of cooperation for a common objective. Obviously this is fostered through judicious use of advisory groups better than through hearing or through other formalized rulemaking procedures." In this instance, as in so many others, the agencies are hostile to formal rulemaking procedures and appear to prefer what they describe as "informality." Such "informality" however, when analyzed in detail, cloaks the identity of the advisory groups, conceals the source and application of the decision, and may give unfair competitive advantage to favored firms within an industry.

Another problem posed by the responses to the questionnaire is the fullness of the agency disclosures. Take, for example, the reply of the Federal Maritime Board and the Maritime Administration. Its answer to Question 32 of the adjudication section (In what manner and what form does your agency make its decisions known to interested parties and to the public?) includes the statement that:

> Agency mimeographs all formal decisions when issued, later prints them in looseleaf form, and eventually binds them in vol-

umes. Decisions are immediately served upon all interested parties; also posted on agency's bulletin board. The public may secure individual reports from the agency, and may buy printed volumes from the Government Printing Office.

We had to learn from sources outside the agency that there has been no bound volume of agency decisions for ten years. In that same agency there is also the perplexing question of whether any separation exists between the functions of the Maritime Administration and those of the Maritime Board. The Maritime Board awards operating subsidies in the neighborhood of $100 million annually and has awarded construction subsidies of around $2 billion since 1950. The Maritime Administration has the responsibility of supervising and administering these subsidies and also exercises broad rulemaking and adjudicatory powers. But today the subsidy grantor, in effect, wears the hat of subsidy supervisor, rulemaker and adjudicator as well. There is at least a question of whether the separation of functions is being observed in letter or in spirit.

It should be made perfectly clear that the study does not level charges of undue influence against any group or agency at this stage. What I do want to stress, however, is that if agency procedures are "informal; if the background, sources, content and scope of decisions are not readily available as matters of public record; if stare decisis is discarded; and if the separation of functions principle is avoided, agency practices become—at best—less efficient and—at worst—ripe for infiltration by the influence peddler.

On the point of separation of functions, let's be sure, however, that the separation operates on a "two-way street." It is just as important that private attorneys and trade groups be "separated" from certain internal aspects of agency operations as that the agency's functions be separated from one another. There have been situations in which agency staffs have learned about policies of other divisions of the same agency only from representatives of the trade groups or from their lawyers.

(4) The question of determining Congressional intent has always been a perplexing one for lawyers. It takes on maze-like proportions, however, when within the span of a few years one finds agency No. 1 reaching a decision on the basis of what it believes Congress must have intended around 1920; agency No. 2 reaching a decision on the basis of what Congress did not do but might have

done if it had considered the special problem involved; and agency No. 3 reaching a decision on the basis of its prognostication of what Congress would be inclined to do sometime in the future. In answering the Committee questionnaire, all three of these agencies stated they have no trouble determining Congressional intent.

In the Food Fair case,[2] decided last fall, the Federal Trade Commission held that it had no jurisdiction over the alleged discriminatory practices of Food Fair Stores on the ground that Food Fair had an auxiliary meatpacking business and was subject to exclusive regulation by the Department of Agriculture under the Packers and Stockyards Act. The Commission recognized that Food Fair's alleged discrimination did not involve any phase of its meatpacking operations. It also asserted that Congress, if it had to face the issue today, would probably confer jurisdiction on the FTC. The agency, however, felt itself bound by what it determined to be the state of the food marketing business and hence the frame of reference for determining Congressional intent when the Packers and Stockyards Act was passed in 1921.

In a decision [3] announced only last month, the National Labor Relations Board, with Board Member Jenkins dissenting, admittedly flouted Sections 8(b)(4)(d) and 10(k) of the Taft-Hartley Act. This the Board held necessary in order to observe "the spirit if not the letter of the Administrative Procedure Act." The NLRB recognized that its own published rules were inconsistent with the applicable provision of the Taft-Hartley Act, but felt bound in the case at hand to follow its published rules despite the inconsistency with the statute.

The Federal Power Commission hearing examiner in the Hells Canyon case [4] felt that he could not recommend the high dam to Congress despite the many advantages he recognized in such a dam because Congress would take no action or would unreasonably delay action on legislation to authorize construction of the high dam. Determination of the intent of Congress at the time Section 7(b) of the Act was passed was not considered paramount.

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[2] In the Matter of Food Fair Stores, Inc., Docket No. 6458 (September 27, 1957). But cf. In the Matter of Giant Food Shopping Center, Inc., Docket No. 6459 (December 19, 1957).

[3] Wood, Wire and Metal Lathers International Union, 119 N.L.R.B. No. 166 (January 22, 1958).

[4] In the Matters of Idaho Power Co., Project Nos. 1971, 2132, 2133, upon application for License under the Federal Power Act, (May 6, 1955) at 55-58.

Specific directions to the agencies indicating Congress's intent about "Congressional intent" would probably be welcomed by Congress, the agencies and the profession.

Where should the Committe study go from here? Only the initial phase of a long-range, complex study has been completed. If such a study is to have lasting value, it should coordinate the Committee's current observations with objective studies of the administrative process in the past. As the first step in such coordination and in setting guidelines for the future, a hearing has been set for February 25, at which we expect to have testimony from the Chairman of the President's Conference on Administrative Procedure—Judge E. Barrett Prettyman; of the Director of the Office of Administrative Procedure—J. Smith Henley; and of the chairmen of the administrative law sections of the American Bar Association—Donald Beelar—and of the Federal Bar Association—Trowbridge vom Baur.

Chairman Dawson hopes that we will have the assistance of the agencies and of the legal profession in providing fuller and more responsive detail about agency procedures. Responsible investigations of individual cases of procedural violations will be undertaken by the Committee staff; supplementary questions will be formulated and additional hearings held when necessary.

The building of a permanent professional staff by Congressional committees is another key element in the effective supervision of administrative procedures. For Congress, even more than the judiciary, must see to it that the mandate given the administrative agencies is carried out faithfully.

Only last week the Court of Appeals for the District of Columbia had occasion to remind us that the problem of abuse of administrative discretion has acquired heightened significance. In a case [5] headlined in the Washington Post as "Court Orders Giraffe Back to Owner, Declares U.S. Stuck its Neck Out," the Court ruled that a Florida zookeeper was entitled to the young giraffe the government had kept from him for two years. "We perceive no basis and none has been demonstrated," said the Court, "upon which a government officer may impose an ad hoc system of licensure." Judge Danaher, who wrote the opinion, stressed that "The Secretary may not by his regulations alter or amend a law; he may merely regu-

[5] Pederson v. Benson, —F. 2d— (February 13, 1958) the government is presently trying to recover from the zookeeper the costs of boarding the giraffe for two years.

late the mode of making effective what Congress has enacted." These words merit underlining.

In closing, the American Bar Association is to be commended for appointing a Special Committee on Administrative Agency Appointments to parallel its standing committee on the Federal judiciary. It is through consistent, professional examination of administrators and the administrative process that all of us concerned with sound and efficient administration of our laws can best achieve the nation's goals.

ADJUDICATION BY THE DEPARTMENT OF HEALTH, WELFARE AND EDUCATION UNDER THE SOCIAL SECURITY ACT OF 1939, AS AMENDED

FANNEY N. LITVIN

The Social Security Act of 1939, as amended, covers a nationwide program of old age, disability and survivors' insurance of vast economic and social impact throughout the United States. Benefits are being paid to millions of beneficiaries under this program at an annual rate of billions of dollars. The annual rate of expenditures for this program increases each year. At present, old age, disability and survivors' insurance protection totals about 350 billions of dollars.

Under the provisions of Section 205 of Title II of the Social Security Act, the Secretary of the Department of Health, Welfare and Education is directed to make findings of fact and decisions as to the rights of any individual applying for old age and survivors' insurance benefits, and upon request of an applicant for such benefits, is required to give such applicant reasonable notice and opportunity for hearing. Pursuant to the provisions of this Act, the Secretary has delegated the adjudicative power to make initial decisions with reference to old age and survivors' insurance benefits through the Commissioner of Social Security to the Bureau of Old Age and Survivors' Insurance.

The 1956 amendments to the Social Security Act provides for payment, under various conditions, to individuals who are disabled, and hence unable to work, and to their dependent children. Under the provisions of this amendment to the Act, the Secretary of the Department of Health, Welfare and Education is empowered to make agreements with the entity in the states approved for handling state vocational rehabilitation matters, or other appropriate state agency, as to disability cases. The decisions of that state agency as to disability cases become the decisions of the Secretary to the same extent as are those of the Secretary in old age and survivors' insurance cases under Section 205 of the Act. Although the Secretary may, on his own motion, review and revise a decision of a state agency that an individual is under a disability, he may

not review or reverse a decision of a state agency finding that an individual is *not* under a disability.

A 1954 amendment to the Act contains the so-called disability freeze provision, under which the formula for computation of old-age and survivors' insurance benefits under the Act basically takes into consideration certain lapsed periods of time during which the applicant was mentally or physically disabled from work, and provides for deletion, both for insured status and in determining average monthly wage of periods of disability. Thus, this amendment to the Act is of major importance to all "wage earners." For example, under certain circumstances, a "wage earner" who has been ill since 1942 and is now reaching retirement age, would be entitled, without the disability freeze provision, to an old age minimum benefit of $30.00 monthly. However, because being entitled to disability freeze under the 1954 amendment to the Act also entitles him to other benefits under the Act, it is possible that by allowance of disability freeze, the "wage earner's" old-age insurance may be more than doubled. If a request for application for the disability freeze provision is disallowed in whole or in part by the Bureau, the applicant is, of course, entitled to a hearing.

The power to hold hearings and make decisions pursuant thereto on appeal from Bureau determinations in the matter of old-age and survivors' insurance, and to hold hearings and make decisions pursuant thereto on appeal from state agency-Secretary determinations in matters of disability insurance has been delegated directly from the Secretary of the Department of Health, Welfare and Education to the Office of Appeals Council in the Social Security Administration. The Office of Appeals Council consists of six members of the Council, and at the present time, 85 Referees, as their hearing examiners are called. These Referees (hearing examiners) are appointed by the Chairman of the Appeals Council from a list of eligibles supplied by the United States Civil Service Commission, who assigns them to various (area) offices throughout the country as needed in the different centers of populations. The number of offices changes from time to time in accordance with the needs of the population. Appeals are sent directly to the respective Referees (hearing examiners) who have authority to hold hearings in their respective areas with respect to initial decisions of the Bureau in cases of old-age and survivors' insurance, and of the state agency-Secretary in cases of disability

insurance benefits, and to affirm, modify or reverse the findings of fact and initial decisions of either the Bureau or the state agency-Secretary. A right is reserved to the applicant to request a review of the Referee's (hearing examiner's) decision by the Appeals Council.

The staff of the Appeals Council includes a "Consulting Referee," two assistants, an Administrative Officer, a Medical Consultant, secretaries and clerical aids. The "Consulting Referee" formerly performed the duties of a Referee (hearing examiner) as well as the administrative duties of the Appeals Council, but at the present time he performs only the administrative work of the Council. He does not now, and has never assigned cases to Referees (hearing examiners), since, as stated above, cases come directly to the Referees (hearing examiners) at their offices and are handled in rotation as they come in. Nor does the Consulting Referee discuss either the facts or the law of cases with Referees (hearing examiners). The Consulting Referee may, however, be consulted by the Referees (hearing examiners) as to precedents, etc. Decisions of Referees (hearing examiners) are issued in their own names without prior approval from anyone and stand as the final administrative decisions of the Department unless modified or reversed by the Appeals Council on a request for review filed by the applicant, or on its own motion.

The Department of Health, Welfare and Education is not represented by counsel before the Referees (hearing examiners) who have before them in any proceeding only counsel for the claimant. Referees (hearing examiners) may, however, call upon the Medical Consultant of the Appeals Council for assistance as to medical definitions, and for objective tests as to types of illnesses, but the Medical Consultant does not testify on the record before the Referees. According to a statement made by the Chairman of the Appeals Council in a report made by him to the United States Civil Service Commission in May, 1955, the Bureau of Old Age and Survivors' Insurance has selected a Medical Advisory Committee to recommend standards for determining physical and mental impairment which causes "inability to engage in any substantial gainful activity" and "which can be expected to result in death or to be of long continued and definite duration." These recommendations are not made public. They are, however, included in part in the Bureau's "Disability Freeze State Manual" which, though not re-

leased to the public, is available to Referees (hearing examiners) for their examination. It is not and cannot be controlling upon them in reaching decisions however. Apparently this is how it works in theory. The writer has no information as to how this works in practice. It would seem to be a dangerous theory, and certainly not within either the letter or spirit of the Administrative Procedure Act which requires that hearing examiners decide cases solely upon evidence of record.

It will be seen from the list of benefits claimed in these proceedings—old-age and disability benefits of the "wage earner," wife's, husband's, child's, mother's, former wife divorcee's, and widow's insurance benefits, and lump sum death claims—that they involve family relationships sometimes including legitimacy of children and the validity of marriages. And since they do involve a benefit program—not an investigative or prosecuting program, as such—they are conducted without the assistance of attendants, and usually in complete privacy. This requirement, intended for the benefit of the parties to the hearings, nevertheless deprives them of the benefits that public hearings generally afford.

It is clearly evident that Referees (hearing examiners) of the Department of Health, Welfare and Education handling an immense load of work involved in the adjudication problems under the Social Security Act of 1934, as amended, need the wisdom of Solomon and like Caesar's wife, must be above suspicion. The whole nation has a vital stake in this program. We must be sure that these Referees (hearing examiners) can thus qualify. One way of insuring such qualifications, is the passage of H.R. 3350, the so-called Federal Practice Act Bill, which will provide for recruitment of high quality hearing examiners, safeguard them against extraneous influence and pressures, and establish compensation commensurate with the tremendous responsibility and complexities of their work in this and other administrative agencies of the government.

SIGNIFICANT AD. LAW CASES, 1957

WILLIAM F. SCHUTZ, JR.

Supreme Court 1956 Term

Primary Jurisdiction

The primary jurisdiction doctrine goes to the very heart of the relationship between the courts and the regulatory agencies, operating in the particularly delicate cases in which the courts have original jurisdiction, but some of the issues to be resolved by the courts are also within the jurisdiction of a regulatory agency. The need is to achieve a modus vivendi which will preserve the aspects of public interest protected and reconcile these with the individual interests involved before each of these jurisdictions when there is potential conflict. Theoretically, of course, where there is concurrent jurisdiction the first forum to receive the case may keep it, or there may be special considerations which send the case first to the court or first to the agency. The probable availability of judicial review of the agency decision in the last of these three situations is not material in deciding whether prior resort to one forum or the other is required. Where there is merely concurrent jurisdiction with no special factors involved, there is no "primary" jurisdiction. The situations in which agency action is deferred pending judicial determination of an issue have not given rise to a recognizable body of law. Consequently, the primary jurisdiction doctrine operates in practice as a restriction on the jurisdiction of the courts. When it applies, "the judicial process is suspended pending referral of" the issues within the special competence of an agency "to the administrative body for its views."

The doctrine has been applied most frequently in cases involving the jurisdiction of the Interstate Commerce Commission, but it has been more controversial, perhaps, in anti-trust cases such as *Far Eastern Conference* v. *United States,* 342 U.S. 570 (1952).

The difficulty arises in trying to determine when prior resort to an agency is required under the doctrine. The original basis of the requirement enunciated in *Texas & Pacific Ry. Co.* v. *Abilene*

Cotton Oil Co., 204 U.S. 426 (1907), was the desirability of uniformity—and, specifically, uniformity in rates. An additional criterion was established by *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922), in which the element of administrative expertise was stressed.

The continuing significance of the primary jurisdiction doctrine is emphasized by *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956) and *United States* v. *Chesapeake & Ohio Ry. Co.* 352 U.S. 77 (1956), in which the Court of Claims and the Court of Appeals, respectively, were reversed. These are strong cases, for the parties did not challenge the lower courts' decisions on primary jurisdiction grounds before the Supreme Court in either instance.

The former case arose on an action in the Court of Claims by three railroads to recover from the United States, as shipper, the difference between the rate actually paid (applicable to gasoline in steel drums) and the rate allegedly due (applicable to incendiary bombs). The shipment consisted of steel aerial bomb cases filled with napalm gel, which is gasoline thickened with aluminum soap powder. The bursters and fuses necessary to ignite this inflammable mixture were not part of the shipment. The government contended that their absence deprived the shipment of the characteristics of "incendiary bombs," and also that if the "incendiary bomb" rate did govern, it was unreasonable as applied to these shipments. On this point the government argued that the court proceedings should be suspended pending reference of the issue to the Interstate Commerce Commission.

The Court of Claims entered summary judgment for the railroads, holding that these were bombs within the meaning of the tariff and that referral of the defense of unreasonableness to the I C C was barred by the two year period of limitation provided by Section 16(3) of the Interstate Commerce Act. Apart from this bar, the lower court seemed to recognize the right of the government to have the issue determined by the Commission. Thus the lower court treated the case as one presenting separate questions of tariff construction and application on the one hand and the reasonableness of the tariff, if applied, on the other. The former question was deemed to be within the initial cognizance of the court whereas the latter was thought to be within the initial competence of the Commission. The parties did not challenge this dichotomy

before the Supreme Court, which, nevertheless, held that both questions were "within the exclusive primary jurisdiction of the" Commission.

Mr. Justin Harlan posed the first question presented as "whether effectuation of the statutory purposes of the Interstate Commerce Act requires that the Interstate Commerce Commission should first pass on the tariff in dispute here; this, in turn, depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act." *Id.* at 65.

Arguing that there must have been commercial reasons for setting a higher rate for the carriage of incendiary bombs and that the basic issue is whether these reasons applied to the shipment in question, the Court concludes that the agency and not the court had the familiarity with these reasons necessary to the determination of the issue. The government and the dissenting judges below had contended that if the high rate for incendiary bombs was due to their hazardous or incendiary qualities, the rate should not apply to napalm-filled bomb cases because the reason for it did not apply. To this contention the Supreme Court replied that only the agency, which had the exclusive power to make the rate in the first instance, knew whether this was the basis for the high rate and, if so, whether it was the sole basis. "It was the Commission and not the court which originally determined why incendiaries should be transported at a higher rate. It is thus the Commission which should determine whether shipments of napalm gel bombs, minus bursters and fuses, meet those requirements; that is, whether the factors making for certain costs and thus a certain rate on incendiaries are present in the carriage of such incompleted bombs." *Id.* at 68. Consequently the Court held "that both the issues of tariff construction and the reasonableness of the tariff as applied were initially matters for the Commission's determination." *Id.* at 70. "This conclusion is fortified by the artificiality of the distinction between the issues of tariff construction and of the reasonableness of the tariff as applied, the latter being recognized by all to be one for the Interstate Commerce Commission." *Id.* at 68.

The government did not argue that the rate for incendiaries was unreasonable in itself, but only that it was unreasonable as applied

to the shipment in question. This is another way of saying that the wrong tariff was applied, and in both instances the issue is the same, i.e., whether the factors calling for the high rate are present in both shipments. The terms in which the issue is phrased should not be permitted to determine the question of jurisdiction.

The courts still have jurisdiction over matters of tariff construction where the Commission has previously construed the particular tariff at issue or has clarified the factors underlying it and also where construing the tariff does not call for examination of the underlying cost-allocation which went into the making of the tariff in the first instance." *Id.* at 69. The jurisdictional question must be decided on the basis of the facts in each case.

The Supreme Court then held that referral of these issues to the agency was not barred by Section 16(3) which provides in (a) that "all actions at law by carriers subject to this chapter for recovery of their charges . . . shall be begun within two years from the time the cause of action accrues, and not after." Thus when a carrier sues a private skipper the action must be brought within two years. However the Court of Claims has held that Section 16(3) does not bar suits by carriers against the United States because the Trucker Act imposes a six year period of limitations on claims cognizable by that court. Thus the Court of Claims in the present suit holds, in effect, that the action is timely brought but that certain defenses are barred by the passage of time. This holding permits the carrier to wait two years and then, any time in the next four years, to bring a suit in which the United States, as defendant, is deprived of certain defenses. The Supreme Court could not find language in the statutes clear enough to justify such a result, nor did the court feel that the basic policy behind statutes of limitation had any relevancy to this situation. They are aimed at lawsuits, not at the consideration of particular issues in lawsuits. Here the action was already in court and held to have been brought in time. . . . "If this litigation is not stale, then no issue in it can be deemed stale." *Id* at 72.

To the argument that the Supreme Court had previously construed Section 16(3) as "jurisdictional" Mr. Justice Harlan replied that this holding applies to the assertion of a right to affirmative recovery and is irrelevant to the issue of referral. It was also argued that the government was protected by its right to file with the Commission a claim for reparations so long as it did so within the

two year period, but to this the Court's answer was the Congress had expressly authorized the G A O to deduct over-payments from subsequent bills of the carrier if, on post-audit, it finds overcharges. This right was deemed necessary to protect the United States because carriers' bills must be paid before audit. Invocation of this right only at the peril of losing defenses in a later suit by the carrier would not be consistent with the purpose of Congress in authorizing unilateral set-off.

Accordingly, ". . . the limitation of § 16(3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's primary jurisdiction. . . ." *Id.* at 44.

The shipment involved in *United States* v. *Chesapeake & Ohio Ry. Co.* consisted of military supplies destined for China via Rangoon. They had been shipped from Pontiac, Michigan, to Newport News, Virginia, when Rangoon fell to the Japanese and as a consequence the government took possession at the latter point. About three months later the government reshipped the supplies to storage centers in Pennsylvania and New Jersey. If the original shipment to China had not been frustrated, the export rate would have applied to the carriage from Pontiac to Newport News, but under the circumstances the carrier billed the United States at the higher domestic rate and received payment. On post-audit the G A O readjusted the charges to the lower rate and deducted the difference from subsequent bills of the carrier.

The carrier sued to recover the amount of these deductions under the Tucker Act, bringing the action in a federal district court. Judgment was given for the carrier in that court and affirmed by the Court of Appeals. The latter court held that the domestic rate applied because the United States abandoned its intention to export and converted the shipment into a domestic one. In addition that court denied the government's request for referral to the I C C on the ground, first, that the question was not one of the reasonableness of rates but their applicability, which the court could decide, leaving no "administrative question" for the Commission, and, second that referral to that body was barred by Section 16(3) in any event.

In reversing, the Supreme Court declared that it did not know "what kinds of factors are involved" and therefore could not say "on this record whether the issue of tariff construction should have

been referred to the Commission." *Id.* at 80. The question should be determined by the Court of Appeals upon a full record on remand.

Mr. Justice Douglas dissented in both cases "since he is of the view that the principle of *Great Northern Ry. Co.* v. *Merchants Elevator Co." supra* "are applicable here." 352 U.S. 77, 81.

Subpoenas

The widely noted opinion of the Court of Appeals for the Ninth Circuit in *Herman* v. *Civil Aeronautics Board,* 237 F. 2d (1956), was reversed in a per curiam opinion in *Civil Aeronautics Board* v. *Herman,* 353 U.S. 322 (1957). See 9 Ad. Law Bull. 126. In a proceeding to enforce a number of subpoenas duces tecum, the district court judge had said that, comparing the allegations of the complaint with the demands of the subpoenas, he could not say that any of the documents were irrelevant or immaterial and he therefore entered an order of enforcement. The Court of Appeals thought that the issue of the relevance and materiality of each document subpoenaed was a judicial question which the trial judge had failed to pass upon. The Supreme Court remanded for reinstatement of the enforcement order, which, it pointed out, "leaves open to respondents ample opportunities for objecting, on relevant grounds, to the admissibility in evidence of any particular document." *Id.* at 324.

Administrative Procedure Act

The majority of the Court in *Pan-Atlantic Steamship Corp* v. *Atlantic Coast Line R. Co.,* 353 U.S. 436 (1957), construed Section 9(b) of the A P A as authorizing the Interstate Commerce Commission to extend a temporary authority granted under Section 311(a) of the Interstate Commerce Act for more than 180 days. Section 311(a) empowers the agency to grant "temporary authority" to a water carrier to institute service for which "there is an immediate and urgent need," but limits the validity of the temporary authority to an aggregate of 180 days. Section 9(b) provides that when a licensee has "made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

In this case Pan-Atlantic had filed for a permanent certificate of convenience and necessity as a common carrier by water and had received temporary authority to operate for 180 days, the Commission having found an immediate and urgent need for the service. The Commission did not conclude the proceedings for the permanent certificate within the period and, therefore, an application of Pan-Atlantic, the temporary authority was extended until further order of the Commission. (The Commission advised the Court that the combined time required for the administrative proceedings and judicial review almost inevitably exceeded 180 days in these cases.) The appellees opposed the extension both before the Commission and in a court proceeding to vacate the order, and won at the district court level, although two of the three judges there indicated they would have held for the Commission had they not felt the case governed by one of their own court's prior cases. (This case became moot after the Supreme Court had noted probable jurisdiction.)

In Mr. Justice Douglas' view, Section 9(b) "contains a new rule that supplements the prior authority granted by § 311(a) . . ." Section 9(b) requires "a license outstanding; it must cover activities of a continuing nature; there must have been filed a timely and sufficient application to continue the existing operation; and the application for the new or extended license must not have been finally determined." *Id.* at 439. These elements are all present in the instant case. Moreover, to hold otherwise would require the discontinuance of a service at the end of 180 days no matter how necessary it might be. "Where the remedy for an evil is clear, the remedial provisions of the Administrative Procedure Act should be given full effect." *Id.* at 440.

Mr. Justice Burton's dissent raises the points, among others, that this decision removes the prod, provided by the 180 day period, for a speedy decision by the Commission; that it permits the indefinite extension of a temporary authority granted *ex parte* whereas he believes that Section 9(b) has reference only to those licenses granted after full opportunity for all interested parties to be heard; that if Section 9(b) does apply, it is mandatory and it would have the incongruous result of preventing the expiration of a temporary authority granted on the basis of an emergency which has terminated; and that Section 9(b) should not apply to "special statutes dealing in precise terms with a specific subject." *Id.* at 446. The

majority had noted that its opinion coincided with the construction of the statutes which the Commission had consistently adapted. To this Justice Burton replied that the Commission's "interpretation was adopted largely as a matter of expediency rather than as a reasoned interpretation" *Id.* at 447 and that in any event it was the Court's function to determine, as a matter of law, the relationship, if any, of the one statute to the other.

Right to Counsel

A deplorable Ohio statute was sustained in *Matter of Groban,* 352 U.S. 330 (1957), by a 5 to 4 decision although it permits a secret administrative investigation before a law enforcement officer having the power to compel testimony under oath through the use of the contempt power. The Court's majority sought to narrow the issue to the single question of the right to be represented by counsel at an administrative inquiry, but even on this limited ground the two opinions for the majority are unsatisfactory, for the Ohio statute is not concerned with a simple administrative investigation at all. The majority assumes the constitutionality of a rule excluding counsel from an administrative investigation, but even if this proposition of dubious validity is accepted for the sake of argument, the Ohio statute would still appear to violate due process.

In this case a deputy fire marshal subpoenaed appellants, directing them to bring their business records and answer questions regarding a fire on the premises of a corporation they owned. They appeared as directed, but with their attorney, stating that they were willing to testify fully if their lawyer were present during the interrogation. The deputy refused to permit counsel to be present, relying on the statutory provision that the "investigation . . . may be private" and that the marshal may "exclude from the place where the investigation is held all persons other than those required to be present. . . ." Appellants refused to be sworn and testify because of this ruling and their refusal was treated as a violation of the statutory requirement that "no witness shall refuse to be sworn or refuse to testify. . . ." For the violation of this section of the statute another section authorized summary punishment "by the officer concerned, by . . . commitment to the county jail until such person is willing to comply with the order of such officer." The deputy committed appellants to the county

jail—although they were released on bond. Appellants' petition for a writ of habeas corpus was denied by three levels of Ohio courts.

At the outset Mr. Justice Reed stated appellants' challenge as going to the constitutional sufficiency of the grounds on which they were committed to jail; i.e., the marshal's authority to exclude counsel violated their right, under the Due Process Clause, to the assistance of their counsel in giving testimony. He then distinguished a state criminal trial, in which a defendant has an unqualified right to be heard through his own counsel, from "an administrative investigation of incidents damaging to the economy or dangerous to the public." The marshal's proceeding "was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibility for the fire." *Id.* at 332.

"The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their Counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies." If the investigation leads to criminal prosecution the witness may then have his counsel. "Until then his protection is the privilege against self-incrimination." *Id.* at 332-333.

"The statute has been in effect since 1900 and represents the legislature's determination that investigations conducted in private may be the most effective method of bringing to light facts concerning the origin of fires, and, in the long run, of reducing injuries and losses from fire caused by negligence or by design. We cannot say that this determination is unreasonable. The presence of advisers to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. And with so weighty a public interest as fire prevention to protect, we cannot hold that the balance has been set in such a way as to be contrary to 'fundamental principles of liberty and justice.' . . . That is the test to measure the validity of a state statute under the Due Process Clause." *Id.* at 334.

In his concurring opinion Mr. Justice Frankfurter seeks to fore-

stall any argument based on the potential dangers of the present decision. But there is a difference between arguing from far fetched pictures of horror and asking a court to understand the consequences of its decision. There is no analogy between a workmen's compensation hearing and the fire marshal's proceeding. It is enough that the former is public and the latter *in camera.* (This is Mr. Justice Frankfurter's phrase. The majority assiduously avoids characterizing the procedure as secret.) The use of this as an example in which, as the Justice says, "the presence of lawyers is deemed not conducive to the economical and thorough ascertainment of the facts," *Id.* at 336 points up the unwillingness of the majority to recognize the marshal's proceeding as an integral part of criminal law enforcement. (The marshal is expressly made ". . . responsible . . . for the prosecution of persons believed to be guilty of arson or a similar crime.")

Equally unfortunate is the assumption of the concurring justices that the privilege against self-incrimination ". . . has attained the familiarity of the comic strips. . . ." *Id.* at 337. In fact, the intricacies of the privilege baffle many lawyers and mere knowledge of the words affords no protection to a witness. Even here the availability of the privilege in investigations as well as prosecutions, is sufficiently a question to lead Mr. Justice Reed to state it affirmatively.

Both of these opinions rely upon the presumption of fair and orderly conduct by state officials; but both apparently fail to realize that the official may act in perfectly good faith and still bring about a miscarriage of justice. This, too, is a part of the majority's refusal to come to grips with the fact that the witness is compelled to give testimony when he is alone and is under the pressure of an investigation into a potential crime and the pressure of coercion by the threat of imprisonment. There is so much emphasis in these opinions on the role of the lawyer as an obscurant that the majority loses sight of the much more usual lawyer's role of helping to establish the facts. It is not easy to remember while reading these opinions that a criminal trial is also a device for establishing the facts concerning a past event and that counsel must be permitted at a criminal trial.

To one reader, at least, there is a strong impression that the opinion-writers were stretching hard in their efforts to sustain this statute. One more example of this is found in the exceedingly

strained analogy to the grand jury, a situation in which the secrecy is counteracted by safeguards too numerous to catalog here. Perhaps this is also reflected in the fact that both of the opinions deny the validity of an argument based upon potential horrors, yet both use a variation of the argument in dealing with the question of the desirability of having counsel at investigations and certain kinds of hearings. With counsel present the proceedings will become "encumbered," "unworkable," "unwieldy" and counsel's presence "is deemed not conducive to the economical and thorough ascertainment of the facts." These possible disadvantages do not weigh heavily when measured against an individual's right to be free from secret inquisitorial proceedings.

Most of these comments and many others are to be found in Mr. Justice Black's dissent. His use of the A P A as an expression of the minimum requirements of fair administrative procedure is of interest to members of this Section. He cites Section 6(a) ("any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel . . .") in answer to the majority's denial of any right to use counsel in an administrative investigation. *Id.* at 347.

The right of a state to regulate its own procedure within the limits of the due process clause is an essential part of our politico-legal system. Mr. Justice Black does not appear to challenge that concept at all. He does indicate that in establishing its procedure a state must, as a matter of due process, at least observe the standards provided by the A P A.

He quotes from the report of the Senate Judiciary Committee on a predecessor bill to that which became the A P A:

"By enacting this bill, the Congress—expressing the will of the people—will be laying down for the guidance of all branches of the Government and all private interests in the country a policy respecting the minimum requirements of fair administrative procedure."

And from the report of the House Judiciary Committee on the House version of the A P A, Mr. Justice Black quotes:

"The bill is an outline of minimum essential rights and procedures." *Id.* at 347-348.

If the A P A sets the minimum standards for fair administrative procedure, it is a guide to the requirements of due process on the state as well as the federal level.

Preclusion of Judicial Review

After a full hearing in a Section 11(b) proceeding under the Public Utility Holding Company Act of 1935, the S E C on March 20, 1953, issued an order directing Middle South Utilities, Inc. and its subsidiary, Louisiana Power and Light Co., to divest themselves of all the non-electric assets of the latter Company. The order gave the companies a year in which to comply. On May 19, 1953, that order ceased to be subject to judicial review with the expiration of the 60 days allowed for a petition to review. Later the S E C extended the time for compliance to March 20, 1955. Louisiana Power and a newly formed subsidiary filed a plan for divestment in the form of a joint "application-declaration" on November 10, 1954, and the S E C notified interested parties of the filing and that they might request a hearing on the proposal. In response, the Louisiana Public Service Commission requested such a hearing and also the reopening of the original proceeding which had resulted in the divestment order. In support of its petition the Louisiana Commission submitted an offer of proof and a brief which showed no change in conditions since the order of March 20, 1953, but argued that the evidence in that proceeding had been incomplete and also that the S E C had acted, at least in part, on an erroneous conception of the law. The S E C heard oral arguments on this petition, found that there was no reason to change its original order, and denied the petition in an order dated September 13, 1955.

On the Louisiana Commission's petition to review, the Court of Appeals set aside the order of September 13, 1955, and in effect set aside the order of March 20, 1953, having held that legal determinations made by the S E C in that order were erroneous. The S E C had moved the court to dismiss the petition to review on the ground that the order of September 13, 1955, was not judicially reviewable and that the petition was an attempt to appeal from the order of March 20, 1953, after the time allowed by law to do so had expired.

The Court of Appeals based its conclusion that it had jurisdiction to review the order of September 13, 1955, on the last two sentences of Section 11(b) which read:

> "The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order

was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 79X of this title."

In a per curiam opinion in *Security Exchange Commission* v. *Louisiana Public Service Commission,* 353 U.S. 368 (1957), the Supreme Court did not agree that the order of September 13, 1955, fell within this language. The Court said, "We hold that the orders made judicially reviewable by the quoted language are the directory orders mentioned in, and authorized by, subsection (b) of § 11 of the Act, and orders which may 'revoke or modify' any such order previously made under that subsection, and that the quoted language does not include an order merely denying a petition to reopen § 11 proceedings." *Id.* at 371.

The order denying the Louisiana Commission's petition was not subject to judicial review and accordingly the Court of Appeals was reversed.

Judicial Review of Alien Exclusion Cases

In *Brownell* v. *Tome We Shung,* 352 U.S. 180 (1956), the Supreme Court held that alien exclusion cases may be reviewed by an action for declaratory judgment as well as by habeas corpus under the Immigration and Nationality Act of 1952. The Court had held in *Shaughnessy* v. *Pedreiro,* 349 U.S. 48 (1955), that an alien ordered deported by the Attorney General under the 1952 Act might test the legality of the deportation order in a declaratory judgment action brought under Section 10 of the A P A. (8 Ad. Law Bull. 48.)

The government argued that an alien seeking initial admission is in a different position under the constitution from a resident alien and that this difference precludes general judicial review. Admitting all of this, the petitioner nevertheless contended that the distinction should not be significant when only the form, and not the scope, of judicial review was involved, and the Court agreed. The substantive law governing the actions, including the scope of judicial review, remains unchanged, but the alien has his choice between two remedies. He can balance the odium of being at least technically in custody against the possibly less expeditious remedy provided by declaratory judgment.

The government also contended that the finality clause of the 1952 Act made administrative appeal to the Attorney General the

only appeal available in an exclusion case (except for habeas corpus) but the Court concluded that the clause referred only to administrative finality. This interpretation is based in part on the ground that limitation or "cutting off" of judicial review runs counter to Sections 10 and 12 of the A P A and that Congressional intent to exempt from the A P A must be clearly expressed.

Administrative Regulations as "Law of the State."

The Federal Black Bass Act makes it unlawful to deliver black bass for transportation from any state if such transportation violates the law of the state from which the fish is to be transported. A rule of the Florida Game Commission prohibits transportation of certain fresh fish, including black bass, outside the state. The Commission was created by constitutional amendment and empowered to adopt rules and regulations, the violation of which is made a misdemeanor by statute.

On these facts a federal criminal information charging violation of the Federal Black Bass Act was quashed by the District Court on the ground that the Commission's rules and regulations were not "the law of the state" within the meaning of that Act. In *United States* v. *Howard,* 352 U.S. 212 (1957), the Supreme Court reversed, holding that the Florida legislature had made an infraction of any Commission regulation a violation of state law, punishable as a misdemeanor, and that the federal act covers violations of regulations on these facts.

Rules and regulations of administrative agencies are commonly considered to be "law," and statutes and judicial decisions frequently state that they "have the force and effect of law."

However, there has been, traditionally, a reluctance on the part of some courts, to permit agencies to create criminal law. This hesitancy may be reflected in the phrasing of the problem in terms of the constitutionality of a legislative delegation to an administrative body of the power to "make" criminal law. On the federal level, *United States* v. *Grimaud,* 220 U.S. 506 (1911), pretty much settled the question. There the Court permitted Congress to provide that the violation of regulations to be adopted by the Secretary of Agriculture was a penal offense. Of course, the Howard case has the added twist that a state administrative agency is providing the substantive law for a federal crime. On the state level the issue is much more alive, but as *Commonwealth* v. *Diaz,* 326

Mass. 525 (1950), indicates, some state courts are prepared to go at least as far as the federal courts.

The defense argued in the present case that the Florida Commission rules lack sufficient substance and permanence to be "law," and Mr. Justice Reed makes it clear that the Court is not passing on the question "whether a state agency could make a rule of such a temporary nature and so unaccompanied by the procedural niceties of rule making that the declaration should not be considered the law of the State for purposes of a statute such as the Black Bass Act." *Id.* at 217. This is a potentially effective defense in a criminal case, but the appellee in the present case had not demonstrated that the applicable rule was of such a character and the district court had not taken these considerations into account in quashing the information.

Other Federal Cases

The Court of Appeals for the District of Columbia turns the statutory right of a United States citizen abroad to the protective power of his government into a reason for denying a citizen the means of effectuating his admitted right to travel. This is a part of the opinion of the majority in *Briehl* v. *Dulles,* 248 F. 2d 561 (D.C.C.R. 1957). In this case a medical doctor sought renewal of his passport, desiring to attend international professional meetings which he had attended in previous years. He refused to furnish the Passport Office an affidavit stating whether he was or had ever been a communist and explaining his connection with certain named organizations. Thereupon his request for passport renewal was tentatively denied and he was informed that it had been alleged that he had been a communist.

Subsequently an "informal" hearing was arranged at the Passport Office and Dr. Briehl's attorney then made three points: (1) that his client's travel in pursuit of his professional practice, study and participation in conferences could not legally be restricted by considerations concerned with his political affiliations; (2) that "everyone has the right to travel regardless of political considerations"; and (3) that his client was entitled to a judicial-type hearing at which the burden would be upon the Department of State to prove by the presentation of evidence and witnesses the truth of the allegation, and that such a hearing included the right on

Dr. Briehl's part to confront such witnesses and examine such evidence.

On the Department's continued refusal to grant renewal of the passport, Dr. Briehl brought a civil action for a declaratory judgment and an injunction. The district court granted the Secretary of State's motion for summary judgment and on appeal Dr. Briehl renewed his contentions that his constitutional right to travel could not be conditioned upon a political test, that he had been denied procedural due process and the hearing to which he was entitled, that the Department's regulations were ultra vires, and that no case had been made out even under the regulations.

The court affirmed the district court's decision, arguing that communism is not merely a political matter but is a conspiracy threatening the nation's security; that in foreign affairs secrecy has surrounded many matters since Washington's administration and, in any event, that in this area the function of the judiciary is narrowly circumscribed by the Constitution's designation of the President and the Senate (Congress) to conduct foreign affairs; that the statutes and regulations here involved do impinge upon the right to travel, a phase of liberty, and, indirectly, upon the exercise of First Amendment rights, but that the balance in this weighing of private right against public requirement is here in favor of the latter.

Two points of the opinion merit attention here. One, a minor point, has already been mentioned. In discussing the nature of a passport, Judge Prettyman alludes to a statute which imposes upon the President the duty of seeking the release of United States citizens wrongfully confined abroad. "So," he says, "while a passport as such does not bestow right of protection which a citizen does not otherwise have, it does, as a permit to travel abroad, allow him to put himself in a position where he may invoke the protective power of this government. So one of the questions here is whether the Secretary may prevent an American with communist affiliations from being in a place where political indiscretion might involve the United States government in international complications." *Id.* at 568.

Surely it is strange reasoning to advance a statute designed to protect the traveler as justification for the denial of an admitted right to travel!

The second point is of immediate importance to the administra-

tive law practitioner. Under the regulations Dr. Briehl was notified that it had been alleged he was a communist. Before any further action, except the "informal" hearing referred to above, would be taken on his application, Dr. Briehl was required to affirm or deny the allegation under oath. Filing of this affidavit was a condition precedent to any quasi-judicial hearing according to the Department, including hearing by the Board of Passport Appeals. Dr. Briehl asserted that he was entitled to be confronted with witnesses and evidence without having first filed the affidavit. Judge Prettyman answers that under our judicial process there is no entitlement to trial until a party has pleaded, drawing an analogy to a default judgment entered under rules of civil procedure against a party who refuses to plead. "It is elementary that a party must raise an issue of fact in order to get a hearing on the facts." *Id.* at 574.

Judge Prettyman adds the argument that Dr. Briehl is an applicant and applicants for licenses and permits frequently are required to give information under oath. Of course, placing the general label of applicant on a party does not furnish any satisfactory basis for determining rights. Arguing from labels is largely meaningless. The first argument, however, calls for comment because it may have far reaching results. The court overlooks, at this place in its opinion, the point it made elsewhere in the same opinion, that there is a right to travel. The agency seeking to frustrate that right has the burden of proof that the frustration is legal. It cannot meet the burden by making allegations unsupported by testimony or other evidence. It cannot shift the burden by making unsupported allegations. To permit such a procedure would make a farce of due process, substituting a system of accusation for one of proof. The accusation is not even verified on information and belief—it stands as a bare allegation, and yet, it is held to be sufficient basis for the denial of an admitted right of an American citizen. It seems to be particularly offensive procedure, where, as here, the applicant had previously been a passport holder, for the presumptions in his favor are stronger than in the ordinary case.

Judge Bazelon's dissent (joined in by Chief Judge Edgerton) concludes that the power exercised by the Secretary has not been granted to him or to the President by Congress, that it is not a power inherent in the office of the President, and that construing

the statutes as granting the power would raise grave constitutional doubts . . . especially to the extent that eligibility is made to depend upon matters of political belief and association. . . ." *Id.* at 596.

In a separate dissent Judge Edgerton emphasizes points made in Judge Bazelon's dissent, and Judge Fahy in his dissent urges remand to compel the Secretary to make findings and a decision, rather than to deny the application on the basis of a refusal to comply with a requirement of the Passport Regulations. In his view, refusal of the applicant to supply the information, without more, is not a reasonable basis for denial of an application for a passport.

Administrative Procedure Act

Subpoenas

The court in *Crafts* v. *Federal Trade Commission,* 244 F. 2d 882 (9th Cir. 1957) attempts to draw a distinction between coverage and jurisdiction in a proceeding to enforce a subpoena duces tecum. The F T C issued the subpoena pursuant to a complaint instituting an investigation into alleged false and misleading interstate advertising by an indemnity insurance company. The company resisted enforcement on the ground that the Commission had no jurisdiction over the insurance industry. The trial court ordered enforcement, but upon appeal the order was reversed.

Under the provisions of the McCarran-Ferguson Insurance Regulation Act the regulation of insurance is left to the states with the proviso that the Sherman, Clayton and Federal Trade Commission Acts "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." The Court of Appeals argued that prior to *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), if the F T C had attempted to exercise this claimed authority the attempt could have been met at the outset on the ground that the Commission lacked authority. "This consideration highlights the proposition that the primary question for a court here is jurisdictional and does not involve coverage." *Id.* at 893. This distinction is advanced to avoid the overwhelming weight of authority that coverage is not to be determined in the enforcement proceedings.

The distinction drawn by Judge Fee is that coverage involves the determination of questions of fact whereas jurisdiction involves a

question of law. Whether or not a party is engaged in interstate commerce and consequently subject to an agency's jurisdiction is a question of fact and a question of coverage, according to this theory, where as the extent of the F T C's jurisdiction, if any it has, over the insurance industry, is a question of law and a question of jurisdiction. Even if the distinction is sound, the dichotomy is not very helpful, but in any event it is certainly arguable that coverage and jurisdiction are one and the same and that they involve mixed questions of law and fact.

Having decided that the trial court must pass upon the issue of jurisdiction in a proper case, the court further decided that the subpoena in this case was not sufficient to present the issue and, therefore, that the proceeding for enforcement must be dismissed.

To be able to find the subpoena "to be in accordance with law" under Section 6 of the Administrative Procedure Act the trial court might have had to place limitations on it, but this subpoena, according to Judge Fee, was so broad and the implications of the complaint so farreaching that limitations might be impossible to frame. On this ground also, it seems, the enforcement order was reversed.

Findings

The findings of the hearing examiner, which had been rejected or modified by the Securities and Exchange Commission, were restored by the Court of Appeals in *Matter of the United Corporation,* 249 F. 2d 168 (3rd Cir. 1957), despite the fact that the district court had issued an order approving and enforcing the order of the Commission. The decision is the more notable because the findings did not involve the factor of credibility or demeanor evidence. The question was the sums to be allowed for fees and expenses of an attorney-in-fact and an attorney for intervenors in a reorganization proceeding. The hearing examiner made specific findings as to the number of compensable hours spent on the case by the claimants and the per hour rate of compensation as well as the exact amount of reimbursible expenses. In most, if not all, of these figures his findings had the concurrence of the corporation. The Commission substituted a round sum, lumping together fees and expenses, less than the total found by the hearing examiner. The Commission rejected the formula of multiplying hours by an hourly rate in favor of a determination on the basis of an over-all

consideration of specified factors, but it then failed to spell out the details of the relationship of those factors to its result.

Judge Kalodner said, "The final order of an administrative agency must include findings and conclusions upon all material issues presented on the record. The reasons or basis for the decision must also be clearly enunciated. This principle is well established in the law and was expressly codified in Section 8(b) of the Administrative Procedure Act." *Id.* at 179. Later he added, "Further, where the agency fails to adopt the findings of the hearing examiner, the Act requires the agency to make a finding or ruling on each exception taken to the intermediate report." *Id.* at 181.

This is a reference to Section 8(b) of the A P A, which, of course, does not distinguish in its language between the requirements where the agency does and where the agency does not adopt the findings of the hearing examiner. The only authority the judge cites for this proposition is *National Labor Relations Board* v. *State Center Warehouse & Cold Storage Co.,* 193F. 2d 156, 158 (9th Cir. 1951), where Judge Healy said, "Respondent contends that the Board failed to observe the requirements of section 8(b) . . . by making a ruling or finding on each exception of the requirement to the examiners' intermediate report. However, the Board's decision and order, which save for certain specified particulars adopted the findings and conclusions of the examiner, unmistakably informed respondent of its rulings on exceptions. Further particularity is not required."

By a negative pregnant this becomes authority for an affirmative requirement when the examiner's report is not adopted. As Bernard Schwartz expressed it in *The Administrative Procedure Act in Operation,* 29 N.Y.U.L.Q. Rev. 1174, 1236, "The findings rule stems from the need for courts to know what it is that an agency has determined in order that they may know what to review." So long as this test is met there is no need to elevate the findings rule to a technical requirement that a formal opinion must accompany orders, whether or not the examiner's report is adopted. As the House and Senate Committee reports put it, "Statements of reasons, however, may be long or short as the nature of the case and the novelty or complexity of the issues may require." Thus the acceptance or rejection of the examiner's report should be just one factor in determining what findings are called for in order to make the order and its basis clear to the courts and the parties.

Publication

Pinkus v. *Reilly,* 157 F. Supp. 548 (D.N.J. 1957), presents an instance of judicial enforcement of Section 3(a) of the Administrative Procedure Act, 5 U.S.C.A. § 1002(a), which provides that "[n]o person shall in any manner be required to resort to organization or procedure" not published in the Federal Register.

The plaintiff Pinkus moved for summary judgment in the district court and sought the issuance of a permanent injunction against further procedure by the Post Office Department on a fraud order entered against him. The Department's organization had been revised to vest in the Assistant General Counsel, rather than the General Counsel, the duty to file complaints. Although this delegation was set out in the Department's published rules of procedure, a separate statement of organization had not been published. The published rules of procedure stated that "Rules dealing with organization and delegation of authority, substantive rules, and rules of procedure will be separately stated pursuant to the requirements of Section 3(a) of the Administrative Procedure Act (5 U.S.C.A. § 1002)." The statement of organization and delegations of authority had not been so published.

The court concluded that Pinkus was required to resort to organization on which his prosecution was based not published in accordance with Section 1002. Accordingly, the court granted the motion for summary judgment and issued an injunction against enforcement of the fraud order—noting, however, that as soon as the Department complied with Section 1002, it was free to take further action against Pinkus.

By way of dicta the court condemned the commingling of functions whereby the Department's General Counsel was vested with authority to file complaints, to supervise their prosecution and to make the final agency decision in such proceedings. The court further observed that such a violation of the separation-of-functions provisions of the Administrative Procedure Act was present notwithstanding the vesting in the Assistant General Counsel of the duty to file complaints where the General Counsel continued to have supervisory power over such proceedings and the Assistant General Counsel.

FEDERAL AGENCY LIAISON PROGRAM

A program has been initiated this year for effecting liaison between the Section and designated representatives of departments and agencies. This program is informal and voluntary but the initial response has been most grateful and there is high expectation of developing interest and cooperation between the Section and agencies on administrative procedure matters of mutual concern.

Mr. Ashley Sellers, Vice Chairman of the National Committee is in charge of the program for the Section and the co-chairman for agency representatives is Mr. Willard W. Gatschell, General Counsel, FPC.

The following are department and agency liaison designees.

Atomic Energy Commission
EDWARD DIAMOND, *Actg. Gen. Counsel*
Agriculture Department
CHARLES W. BUCY, *Asst. Gen. Counsel*
Civil Aeronautic Board
WILLIAM J. DIXON, *Trial Attorney*
Commerce Department
KENNETH F. MCCLURE, *Asst. Gen. Counsel*
Department of Labor
STUART ROTHMAN, *Solicitor of Labor*
Federal Communications Commission
EDGAR W. HOLTZ, *Assoc. Gen. Counsel*
Federal Power Commission
WILLARD W. GATCHELL, *Gen. Counsel*
Federal Trade Commission
EARL W. KINTNER, *Gen. Counsel*
Foreign Claims Settlement Commission
ANDREW T. MCGUIRE, *Gen. Counsel*
Interior Department
FRANK B. HORNE, *Spec. Asst. to Dep. Sol.*
Interstate Commerce Commission
JOHN F. CUSHMAN, *Assoc. Gen. Counsel*
Justice Department
J. SMITH HENLEY, *Direc. of Adm. Proc.*

National Labor Relations Board
JAMES CONSTANTINE, *Solicitor*
Post Office Department
LOUIS J. DOYLE, *Assoc. Gen. Counsel*
Securities and Exchange Commission
THOMAS G. MEEKER, *Gen. Counsel*
Treasury Department
ALLISON RUPERT
Veterans Administration
MYER S. LIPPS, *Spec. Asst. to Gen. Counsel*

AMERICAN BAR ASSOCIATION BY-LAWS OF THE SECTION OF ADMINISTRATIVE LAW

(February 25, 1958)

ARTICLE I

Section 1. This Section shall be known as the Section of Administrative Law.

Section 2. The purpose of this Section shall be to promote the sound development of local, state and federal administrative law, procedure, and practice.

ARTICLE II

Membership

Section 1. Each member of the Section shall pay to the American Bar Association annual dues of five dollars. Any member of the Association, upon request to the Secretary of the Association and upon payment of dues for the current year, shall be enrolled as a member of this Section. Thereafter said dues shall be paid in advance each year beginning on the July first next succeeding such enrollment. Any member of this Section whose annual dues shall be more than six months past due shall thereupon cease to be a member of this Section. Members so enrolled and whose dues are so paid shall constitute the membership of this Section.

ARTICLE III

Officers

Section 1. The Officers of this Section shall be a Chairman, Vice-Chairman and Secretary.

Section 2. There shall be a Council, which shall consist of the Chairman, the last retiring Chairman, the Vice-Chairman, the Secretary, and the Section Delegate, all of whom shall be members ex officio, together with twelve other members to be elected by the Section as hereinafter provided.

Section 3. As used in Articles III, IV, and VI of these By-laws a year shall be deemed to commence at the close of the annual meeting of the American Bar Association and to end at the close of the next

annual meeting. The Chairman, Vice-Chairman, and Secretary shall be nominated and elected each year in the manner hereinafter provided, and shall hold office for a term of one year. The Section Delegate shall be nominated and elected each even-numbered calendar year and shall hold office for a term of two years.

Section 4. At each annual meeting four members of the Council shall be nominated and elected for terms of three years; in addition, there shall be nominated and elected a Council member to fill each existing vacancy who shall serve during the remainder of the term of such vacant position.

Section 5. No person shall be eligible for nomination or election as an officer, Section Delegate, or a member of the Council unless he shall have been a member of the Section throughout the year in which the election is held. No member of the Council who is serving as an elected member and has served as such continuously for a period of three years shall be eligible for re-election as a member of the Council.

ARTICLE IV

Nomination and Election of Officers

Section 1. At a time not later than the close of the mid-year meeting the Chairman, after consultation with the Council, shall appoint a Nominating Committee of three members of the Section who are not members of the Council, and he shall promptly thereafter announce the names of the members of the Committee in the Administrative Law Bulletin, or by other publication to Section members. The Chairman shall appoint a member to fill any vacancy that may arise thereafter in the Nominating Committee; a vacancy shall be deemed to exist for any Nominating Committee member who is not present at the annual meeting. The Nominating Committee shall make and report one nomination for each position which is to be filled by election at the annual meeting as provided in Article III of these By-laws. The report shall identify each nominee and shall include a brief statement of his activities in the Section and in the law profession generally. The Committee shall submit its report to the Chairman of the Section who shall cause it to be published in the Administrative Law Bulletin, or otherwise published to Section members, prior to the annual meeting. The Nominating Committee shall supplement its published report and action by making one nomination for each unanticipated vacancy, if any, that may arise prior to the beginning of the annual meeting of the Section. At the commencement of the first session of the annual meeting of the Section, the Section Chairman shall orally announce the report of the Nominating Committee, and, after a reasonable interval

to be then fixed and announced by the Chairman, before the conclusion of that session, additional nominations for any specified position may be made from the floor; the nominator shall briefly identify the nominee as above provided with respect to the report of the Nominating Committee. Seconds to such nominations shall not be permitted. The Chairman shall then announce the time and place when the election will be held in conformity with Section 2 of this Article.

Section 2. All elections shall be held at the last session of the annual meeting and elections for contested positions shall be by written ballot unless otherwise ordered by unanimous consent of the Section members present. Each position to be filled by election shall be voted upon separately. Election shall be by a majority of the votes cast, and a run-off election to choose between the two leading candidates shall be held if a majority vote is not initially obtained.

ARTICLE V

Duties of Officers

Section 1. Chairman. The Chairman shall preside at all meetings of the Section and of the Council. He shall formulate and present at each annual meeting of the American Bar Association a report of the work of the Section for the then past year. He shall perform such other duties and acts as usually pertain to his office.

Section 2. Vice-Chairman. Upon the death, resignation or during the disability of the Chairman, or upon his refusal to act, the Vice-Chairman shall perform the duties of the Chairman for the remainder of the Chairman's term except in case of the Chairman's disability and then only during so much of the term as the disability continues.

Section 3. Secretary. The Secretary shall be the custodian of all books, papers, documents, and other property of the Section, except money. He shall keep a true record of the proceedings of all meetings of the Section and of the Council, whether assembled or acting under submission. With Chairman, he shall prepare a summary or digest of the proceedings of the Section at its annual meeting for publication in the Annual Report of the American Bar Association, after approval by the Association's Committee on Publications. He, in conjunction with the Chairman, as authorized by the Council, shall attend generally to the business of the Section. He shall keep an accurate record of all moneys appropriated to and expended for the use of the Section.

ARTICLE VI

Duties and Powers of the Council; Meetings

Section 1. The Council shall have general supervision and control of the affairs of the Section subject to the provisions of the Constitu-

tion and By-laws of the American Bar Association and the By-laws of this Section. During the interval between meetings of the Section, the Council shall have full authority to act for the Section in any way in which the Section itself would be authorized to act, and any such action taken by the Council pursuant to this provision shall be reported to the members of the Section at the next annual meeting of the Section. The Council shall especially authorize all commitments or contracts which shall entail the payment of money, and shall authorize the expenditure of all moneys appropriated for the use or benefit of the Section. It shall not, however, authorize commitments or contracts which shall entail the payment of more money during any fiscal year than the amount which shall have been previously appropriated to the Section for such fiscal year.

Section 2. The Council may authorize the Chairman to appoint committees from Section members to perform such duties and exercise such powers as the Council may direct, subject to the limitations of these By-laws and the By-laws of the American Bar Association.

Section 3. The Council during the interim between annual meetings of the Section, may fill vacancies in its own membership or in the offices of Secretary or Section Delegate, and, in the event of a vacancy in both the office of Chairman and Vice Chairman, then in the office of Chairman. Members of the Council and officers so selected shall serve until the close of the next annual meeting of the Section, except in the case of the Section Delegate, who shall serve for the remainder of the term.

Section 4. All binding action of the Council shall be by a majority vote of the whole Council.

Section 5. Members of the Council when personally present at a meeting of the Council shall vote in person, but when absent may communicate their vote, in writing, upon any proposition, to the Secretary and have it counted, with the same effect as if cast personally at such meeting.

Section 6. The Chairman of the Section may, and upon the request of any member of the Council shall, submit or cause to be submitted in writing, to each of the members of the Council, any proposition upon which the Council may be authorized to act, and the members of the Council may vote upon such proposition or propositions so submitted, by communicating their vote thereon, in writing over their respective signatures, to the Secretary, who shall record upon his minutes each proposition so submitted, when, how, at whose request same was submitted, and the vote of each member of Council thereon, and keep on file such written and signed votes. If the votes of a majority of the members of Council so recorded shall be in favor of such proposition or if such majority shall be against such proposition, such majority vote shall constitute the binding action of the Council.

Section 7. The Council shall hold two regular meetings each year, the first to be held in connection with the mid-year meeting of the House of Delegates, and the second to be held prior to the annual meeting of the Section. Special meetings of the Council may be called upon reasonable notice by the Chairman with prior approval of a majority of the Council, and shall be so called upon written request by a majority of the Council.

Section 8. If any elected member of the Council shall fail to attend two successive meetings of the Council, the office held by such member shall be automatically vacated, and the vacancy shall be filled as provided in Section 3 of this Article and in Section 4 of Article III.

ARTICLE VII

Meetings

Section 1. The annual meeting of the Section shall be held during the annual meeting of the American Bar Association, in the same city or place as such annual meeting of the American Bar Association, with such program and order of business as may be arranged by the Council.

Section 2. Special meetings of the Section may be called by the Chairman upon approval of Council, at such time and place as the Council may determine.

Section 3. The members of the Section present at any meeting shall constitute a quorum for the transaction of business.

Section 4. All binding action of the Section shall be by a majority vote of the members present.

ARTICLE VIII

Miscellaneous Provisions

Section 1. The fiscal year of the Section shall be the same as that of the American Bar Associaton.

Section 2. All bills incurred by the Section, before being forwarded to the Treasurer of the American Bar Association for payment, shall be approved by the Chairman or the Secretary, or, if the Council shall so direct, by both of them.

Section 3. No salary or compensation shall be paid to any officer, councillor, or member of a committee.

Section 4. Any action by this Section must be approved by the American Bar Association before the same becomes effective as the action of the American Bar Association. Any resolution adopted or action taken by this Section may on request of the Section be reported by the Chairman of the Section to the annual meeting of the American Bar Association for the Association's action thereon.

Section 5. These by-laws shall become effective upon the approval thereof by the House of Delegates upon recommendation of the Board of Governors of the American Bar Association and by this Section.

Section 6. All printing for the Section or for the Council or any committee of the Section shall be done under the supervision of the headquarters office of the American Bar Association.

ARTICLE IX

Amendments

These by-laws may be amended at any annual meeting of the Section by a majority vote of the members of the Section present and voting, provided such proposed amendment shall first have been approved by a majority of the Council and provided, further, that no amendment so adopted shall become effective until approved by the House of Delegates upon recommendation of the Board of Governors of the American Bar Association.